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No. 660.

Supreme Court of the United States

October Term, 1949.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, Petitioner and Appellant Below,

versus

BOND BROTHERS, - - - - Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BOND BROTHERS,
Respondent,

By ERNEST WOODWARD,
Counsel for Respondent.

Of Counsel:

SQUIRE R. OGDEN,
Marion E. Taylor Building,
Louisville, Kentucky,

WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

BOND BROTHERS, - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

I. STATEMENT OF THE CASE.

Louisville and Jefferson County Metropolitan Sewer District (herein called "Petitioner") seeks a review of a decision of the Court of Appeals of Kentucky holding valid and enforceable the reservation of a right to use a sewer for storm water and sewage draining, which reservation, made contemporaneously with the grant of an easement for the construction of a sewer, was embodied in a deed (R. 8) and a judgment (R. 44). The decision affects only the owners of a tract of land near Louisville, Kentucky.

The facts presented are not shown to appear in connection with any other tract of land situated in the area served by Petitioner, and the question presented is not one of any general importance in that area or elsewhere.

(1) The Facts.

In 1928 the tract of land to which the decision of the Kentucky Court relates was owned by Producers Wood Preserving Company (herein called "Producers"). Producers is the predecessor in title of Bond Brothers, the Respondent. There was a creek through the tract of land called Paddy's Run, which creek was used "for the disposal of a large volume of water utilized" in the plant operated by Producers (R. 43). In connection with the construction of said sewer by the Board of Sewerage Commissioners (herein called the "Board"), Petitioner's predecessor, "it was deemed necessary to run an open drainage channel following the course of Paddy's Run through the property" (R. 43).

Being unable to agree with Producers on the price to be paid for the easement for such drainage channel, eminent domain proceedings were brought by the Board for the purpose of acquiring the easement and determining the price to be paid therefor. The litigation was finally put at rest by judgment (R. 7) and a deed (R. 8) pursuant to which Producers (a) granted a perpetual easement to construct a covered concrete sewer[1] in connection with which provision was made for filling the valley of Paddy's Run to the level of

[1]The plan to construct an open drainage channel was changed. A covered concrete sewer was constructed.

high ground, and (b) reserved the right to drain its storm water and sewage into the concrete sewer, the Board agreeing "to construct suitable openings or connections into its main sewer" (R. 8, 13) for Producers' use. The deed (R. 13) expressly provides that "All grants * * * agreements, stipulations and covenants shall run with the land hereby granted and be for and to the successors and assigns of the parties hereto."

From 1929, the date the grant was made, until the creation of Petitioner in 1946 (R. 2) by act of the General Assembly of Kentucky, no effort was made to levy a charge upon Producers and its successors in title for the use of the sewer; but upon the creation of Petitioner, and the grant to it of power to establish and collect rates, rentals and charges for the use of sewers, Petitioner asserted it had been given the statutory power to charge Bond Brothers for the use of the sewer and thus destroy, without any compensation paid, the vested property right of Bond Brothers to use the sewer.

This action (R. 1) was filed by Bond Brothers for a declaration of its rights to the use of the sewer[2] and for an injunction to restrain Petitioner from ceasing to serve Bond Brothers' property with its sewer facilities. The trial court (R. 39) held that Producers and its successors in title did not, by the aforesaid judgment and deed, "acquire the right to use the sewers

[2]By its petition, Bond Brothers also challenged the right of Petitioner to enforce its proposal to charge higher rates for sewer service to Bond Brothers and others owning property situated outside the corporate limits of Louisville than the rates proposed to be charged to property owners within the City. That question, determined contrary to the claim of Bond Brothers, is not pertinent here.

without the payment of any sewer service charge that thereafter might be imposed by law." On appeal, that decision was reversed by the Court of Appeals of Kentucky by its opinion (R. 42-54), dated June 25, 1948. On the basis of the questions decided in that opinion, the determination must be made whether to grant the petition for writ of certiorari.

The precise questions decided by the Court of Appeals of Kentucky are:

1. The judgment and deed to which Producers and the Board were parties "granted Producers, for a valuable consideration, the use of this sewer and * * * such right and use passed to its successors in title to the land for similar industrial purposes" (R. 47).

2. The Petitioner may not, without paying compensation, destroy Bond Brothers' rights set forth in the deed and judgment to which Producers was a party, since there "is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment" R. 50).

3. Bond Brothers' right to the use of the sewer is protected by the provisions of Sections 1 and 13 of the Kentucky Constitution, which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to public use without the consent of his representative and without just compensation being previously made to him' " (R.49).

II. SUMMARY OF ARGUMENT.

No question expressly decided by the Court of Appeals of Kentucky was such as to give this Court jurisdiction.

III. ARGUMENT.

Point (1). The Kentucky Court Has Not Decided a Federal Question.

As the first question presented (R. 43), the Kentucky Court determined as a matter of construction of the language used by the parties in the preparation of a deed and a judgment, that Producers reserved to itself the right to use, without charge, the sewer facilities for discharging its storm water and sewage (R. 47). The Kentucky Court thereupon decided the legal questions (1) that there was in fact no demand requiring the use of the police power to take property without compensation, and thus to nullify the deed and judgment by which such rights were reserved to Producers, and (2) that in any event, the right of Bond Brothers to the use of the sewer was protected by Sections 1 and 13 of the Kentucky Constitution which recognize as inalienable "the right of acquiring and protecting property" and declare that the property of no citizen shall be taken "or applied to public use without the consent of his representative and without just compensation being previously made to him."

There is thus no decision by the Kentucky Court of a Federal question.

Point (2). References to a Federal Question Were Merely Incidental to the Decision of Questions of Kentucky Law.

After deciding the questions as stated, the Kentucky Court called attention to the decision of this Court in *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, merely to show that this Court, consistent with the Kentucky Court's decision concerning the application of Sections 1 and 13 of the Kentucky Constitution, had recognized certain limitations upon the exercise of police power. The Kentucky Court also called attention to certain other decisions of this Court and other courts relating to recognized limitations upon the exercise by a sovereign of the police power. However, there is no language contained in the opinion which remotely supports a contention that the Kentucky Court undertook to decide a Federal question.

Certain it is that determination of a Federal question was not necessary to the decision of the case, and was not so considered by the Kentucky Court.

In *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, this Court stated:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the

judgment as rendered could not have been given without deciding it."

Such requirement for jurisdiction of this Court is not met in this case.

Point (3). If it be Considered that a Federal Question Was Decided, Jurisdiction Will be Denied Since the Decision Rests on an Independent Ground.

In the *Lynch* case, there is the further statement:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Thus, if it be urged that the Kentucky Court has by implication decided a Federal question, nevertheless "the ground independent of a federal question," to-wit: that based upon Sections 1 and 13 of the Kentucky Constitution, is sufficient in and of itself to sustain the decision of the Kentucky Court.

It is clear that the decision of the Kentucky Court did not require it to determine any Federal question. At best, the right claimed by Bond Brothers is only remotely assignable to a Federal question. Under such circumstances, no Federal question is presented here. *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 806; *Little* v. *Williams,* 231 U. S. 335; *Radio Station WOW* v. *Johnson,* 326 U. S. 120.

Point (4). The Decision of the Kentucky Court Is Not One of General Importance.

Under no circumstances can it be said that the State Court has decided a question of substance or one of general importance. The decision relates to one isolated tract of land in Jefferson County having appurtenant rights as a result of a deed and judgment not shown to be similar to any other tract of land in the restricted area served by Petitioner. Thus it is the narrow question presented is of no general importance in the Louisville area. Attention is not directed to any decision in any jurisdiction of a similar question, and therefore the question has no general importance or application. Clearly, the case is decided on grounds having no relation to any Federal question, and therefore the decision of the Kentucky Court will be accepted, whether it be considered right or wrong. *Nichol* v. *Cole,* 256 U. S. 222.

As the Kentucky Court said (R. 53), Bond Brothers' "predecessor reserved or retained a right which it had, *viz.,* to use the same channel for drainage purposes." Other property owners served by the sewer did not have such property right. The decision, applying provisions of the Kentucky Constitution, prevents Petitioner from confiscating Bond Brothers' property right. If the elimination of that right is necessary for the proper operation of the business of Petitioner, it may exercise its power of eminent domain[3] and compensate Bond Brothers for the value of its right.

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[3]KRS 76.080.

The principles relating to the right of a sovereign to exercise the police power, as announced by the Kentucky Court, are uniformly recognized by courts generally, and do not depart from decisions of this Court.

There is an express holding that sewer construction or operation is within the police power, the Court saying (R. 48):

> "To accomplish that objective, the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution. * * * If the menace has been removed, public necessity and general welfare have been met and served, and the object has been accomplished, the question is whether the police power may be asserted years afterward, to destroy property rights or to abrogate a contract made by the same unit of government in order to raise revenue to operate and maintain the facilities."

The limitations on such power are stated as follows:

> "It is fundamental that such an extraordinary power is not without limitation for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. The exercise of the power must have a substantial basis and cannot be made a mere pretext for actions that do not come within the scope. To state it another way, the action of the government may not arbitrarily invade liberty

or property rights under the guise of police regulation" (R. 48).

* * * * * *

"In the case at bar, the public demand or necessity is far from being great. There is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment."

IV. CONCLUSION.

The petition for writ of certiorari should be denied. No Federal question was decided by the Kentucky Court. The case was decided by the application of principles relating to construction of legal documents, and by the application of provisions of the Kentucky Constitution. The Kentucky Court correctly determined that the property right to use the sewer, a right appurtenant to the isolated tract of land and one not common to the owners of other property, should not be destroyed for the benefit of Petitioner and other property owners without compensation being made therefor.

Respectfully submitted,

ERNEST WOODWARD,
Counsel for Respondent.

Of Counsel:

SQUIRE R. OGDEN,
Marion E. Taylor Building,
Louisville, Kentucky,

WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky.

APPENDIX.

KRS 76.080 "General Powers of District."

The District created under the provisions of this chapter is empowered:

(1) To have jurisdiction, control, possession, and supervision, of the existing sewer and drainage system of such city of the first class; to maintain, operate, reconstruct, and improve the same as a comprehensive sewer and drainage system, and to make additions, betterments, and extensions thereto, within the corporate limits of such city of the first class and within the limits of the county containing such city beyond such city limits, and to have all the rights, privileges, and jurisdiction, necessary or proper for carrying such powers into execution. No enumeration of powers in this chapter shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant.

(2) To prepare or cause to be prepared and to be thereafter revised and adopted, plans, designs, and estimates of costs, of a system to trunk, intercepting, connecting lateral, and outlet sewers, storm water drains, pumping and ventilating stations, disposal and treatment plants and works, and all other appliances and structures, which in the judgment of the Board will provide an effective and advantageous means for relieving such city of the first class and areas in the county in which such city is located outside the city limits which may be embraced in the District, from inadequate sanitary and storm water drainage and from inadequate sanitary disposal and treatment of the sewage thereof, or such sections or parts of such system as the Board may from time to time deem proper or convenient to construct, consistent with the plans and purposes of this chapter, and is authorized and empowered to take all such steps as the Board may deem proper and necessary to effect the purposes hereof.

(3) To construct any additions, betterments, and extensions, to the facilities of the District, by contract or contracts, or under, through, or by means of its own officers, agents, and employes. Provided, however, that before any construction of new sewers or the extension of any existing sewers is begun, the plans for all such projects shall, if said project is within the corporate limits of the City of Louisville, be first submitted to the Director of Works of the City of Louisville for approval by him, and, if so approved, then to be approved by ordinance adopted by the Board of Aldermen of the City of Louisville; and if said project is outside the corporate limits of the City of Louisville, the plans therefor shall then be first approved by the County Engineer of Jefferson County, and, if approved by him, then to be approved by proper action of the Fiscal Court of Jefferson County, except that if said project is without the corporate limits of the City of Louisville but within the corporate limits of any incorporated city, drainage district, or other political subdivision within Jefferson County, then such prior approval shall be obtained from the governing authorities of any such political subdivision or district.

(4) To establish, construct, operate, and maintain, as a part of the sewer and drainage system of the District, sewage treatment and disposal plants and systems and all the appurtenances and appliances thereunto belonging. Such sewage treatment and disposal plants may be located in the city, or beyond the limits of the city in the county in which the city is located, as the Board may deem expedient.

(5) To acquire and hold such personal property as the Board may deem necessary and proper for carrying out the corporate purposes of the District and to dispose of personal property when the District has no further need therefor.

(6) To acquire by purchase, gift, lease, or by condemnation, such real property or any interest, right, easement, or privilege therein, as the Board may determine necessary, proper and convenient for the corporate purposes of the District and to use the same so long as such corporate

existence shall continue, and same is necessary or useful for the corporate purposes of the District.

Condemnation proceedings may be instituted in the name of the District pursuant to a resolution of the Board declaring the necessity for the taking, and the method of condemnation shall be the same as provided in KRS 416.120. When the Board by resolution declares that any real property which it has acquired, or any interest therein, is no longer necessary or useful for the corporate purposes of the District, such real property and interest therein may be disposed of. (1946 c 104, § 6. Eff. 7-1-46.)

(7) To make by-laws and agreements for the management and regulation of its affairs and for the regulation of the use of property under its control and for the establishment and collection of sewer rates, rentals and charges, which sewer rates rentals and charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided. (1948 c 180, § 2. Eff. 6-17-48.)

(8) To make contracts and execute all instruments necessary or convenient in the premises.

(9) To borrow money and to issue negotiable bonds and to provide for the rights of the holders thereof. (1946 c 104, § 6. Eff. 7-1-46.)

(10) To fix and collect sewer rates, rentals, and other charges, for service rendered by the facilities of the district, which sewer rates, rentals, and other charges, applicable within the limits of a city of the first class, shall be subject to the approval supervision and control of the legislative body of such city as hereinafter provided. (1948 c 180, § 3. Eff. 6-17-48.)

(11) To enter on any lands, waters and premises for the purpose of making surveys, soundings and examinations. (1946 c 104, § 6. Eff. July 1, 1946.)

Constitution of the Commonwealth of Kentucky as adopted September 28, 1891 as amended:

Section 1. Inherent and inalienable rights—All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

1. The right of enjoying and defending their lives and liberties.
2. The right of worshipping Almighty God according to the dictates of their consciences.
3. The right of seeking and pursuing their safety and happiness.
4. The right of freely communicating their thoughts and opinions.
5. The right of acquiring and protecting property.
6. The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

Section 13. Jeopardy; property not to be taken without compensation.—

No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.